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DOCKET FILE COPY ORIGINAL

February 24, 1995

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: PR Docket No. 94-105

Dear Mr. Caton:

Enclosed for filing is an original and four copies of the Comments of McCaw Cellular Communications, Inc. on the Unredacted California Petition. **This filing is subject to a Protective Order in the above-referenced proceeding. The accompanying original and four copies contain no Confidential Information, as defined in the Protective Order, and may be placed in the Commission's Public File.** Pursuant to Sections 7(a) and (b) of the Protective Order, pages containing references to Confidential Information are being filed separately under separate cover letter.

Pursuant to Section 6(b) of the Protective Order, this letter shall also serve as notice to the Commission and the parties that counsel to McCaw have disclosed Confidential Information to Bruce M. Owen and Mark Frankena of Economists Incorporated, who were requested by counsel to furnish expert advice and to prepare material for the purpose of formulating its

comments. Pursuant to Section 6(b) of the Protective Order, Confidential Information was disclosed after advising such persons of the terms and obligations of the Protective Order and obtaining written consent to be bound by its terms.

Please address any inquiries to the undersigned.

Sincerely,

James A. Kirkland

cc: Attached Service List

36395.1

Confidential Information Included
Pursuant to Protective Order, PR Docket No. 94-105

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	PR Docket No. 94-105
Public Utilities Commission of	)	
the State of California to Retain	)	
Regulatory Authority Over	)	
Intrastate Cellular Service Rates	)	

To: The Commission

COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC. ON UNREDACTED CALIFORNIA PETITION

MCCAW CELLULAR COMMUNICATIONS, INC.

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February 24, 1995

Confidential Information Included
Pursuant to Protective Order, PR Docket No. 94-105

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To: The Commission

COMMENTS OF McCAW CELLULAR COMMUNICATIONS, INC. ON UNREDACTED CALIFORNIA PETITION

Pursuant to the Commission's two Confidentiality Orders in the above-captioned proceeding,[1/] McCaw Cellular Communications, Inc. ("McCaw"),[2/] by its attorneys, hereby submits its comments on the unredacted version of the above-captioned petition ("Petition") filed by the California Public Utilities Commission on February 1, 1995.

1/ Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, D.A. 95-111 (Wireless Telecommunications Bureau, released Jan. 25, 1995) ("First Confidentiality Order"); Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, D.A. 95-208 (Wireless Telecommunications Bureau, released Feb. 9, 1995) ("Second Confidentiality Order").

2/ On September 19, 1994, McCaw became a wholly-owned subsidiary of AT&T Corp.

Introduction and Summary

In its Comments and Reply Comments in this proceeding[3/], McCaw established that California's petition did not come close to clearing the "substantial hurdle" established by the Commission for the grant of such petitions. California's petition relies on a variety of "evidence" that California cellular markets are not competitive, which is internally inconsistent and lacking any basis in sound economics or rigorous competitive analysis. As confirmed by the attached Supplemental Declaration of Economists, Inc. ("Supplemental Owen Declaration"), the newly unredacted data does nothing to strengthen California's case. In fact, review of the data reveals that the CPUC has made fundamental errors in analyzing and interpreting the data. More fundamentally, even if the CPUC had correctly interpreted the data, the comments of McCaw and others have established that the economic arguments which the data allegedly support are baseless.

The data which has now been unredacted is offered in support of three basic arguments by the CPUC. First, the market share data contained in Appendix E purportedly demonstrate that relative market shares of facilities-based cellular carriers are "stable," which allegedly evidences the absence of vigorous competition. In fact, the underlying data which has now been unredacted show significant changes in market shares in most of the markets described. The CPUC's generalization is thus false and unsupported. In any case, as set forth in the

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[3/] Opposition of McCaw Cellular Communications, Inc., PR Docket No. 94-105 (filed September 19, 1994); Reply Comments of McCaw Cellular Communications, Inc., PR Docket No. 94-105 (filed October 19, 1994).

Supplemental Owen Declaration attached hereto, stable market shares do not establish a lack of competition.

Second, the unredacted data are relied upon by the CPUC to establish that the market share of resellers is declining, as evidence of the "abuse of market power" by cellular carriers. The CPUC further argues that in light of these trends, resellers are in danger of "disappearing," thus eliminating resellers as a source of competition to facilities-based carriers. As a threshold matter, as McCaw argued in its Comments and Reply Comments, the presence or absence of resellers in a market has nothing to do with the level of competition. Resellers do not add capacity. Moreover, if resale is an efficient means of selling cellular services, facilities-based carriers lack incentives to harm resellers, even if they did have market power. In any case, the unredacted data show that while the market share of resellers in some cases is declining, the total number of customers served by resellers is relatively stable. As McCaw argued in its Comments, such evidence is consistent with the inability or unwillingness of resellers to successfully compete for new customers, rather than indicating anticompetitive conduct by cellular carriers. Perhaps more importantly, the stable customer base revealed by the data refutes the CPUC's contention that resellers are in danger of "disappearing."

Third, the CPUC uses the unredacted data with respect to capacity utilization by cellular carriers to try to demonstrate that cellular carriers have excess capacity, and, therefore, must somehow be exercising market power to constrain the supply of cellular services. The CPUC in fact understates the level of capacity utilization actually shown by the unredacted data. In any case, as McCaw established in its Comments, this simplistic analysis ignores the realities of modern cellular systems. Cellular systems must be designed to accommodate short-term

subscriber growth, as well as periods of peak demand, with the result that actual utilization levels may fall below the CPUC's arbitrary definition of "full" utilization for this reason alone. Moreover, cellular systems must be designed for ubiquitous coverage, irrespective of the relative levels of demand for service in any particular area. It would thus be surprising if all cells had uniformly high levels of utilization, and the absence of "full" utilization of all cells can hardly be considered evidence of less than full competition.

In short, a review of the unredacted data reveals both simple errors and profound analytical defects in the CPUC's case. Far from supporting the case for retention of regulatory authority, the data further undermine California's already insufficient petition.

I. THE CPUC'S EVIDENCE IN SUPPORT OF ITS PETITION, WHETHER PUBLIC OR CONFIDENTIAL, MUST MEET A DEMANDING STANDARD

As set forth more fully in McCaw's Comments, the statutory framework established by Congress, as well as the Commission's prior decisions, establish an extremely high burden of proof which must be met prior to grant of any state petition.[4/] By expressly preempting state authority over CMRS rates, Congress sought "[t]o foster the growth and development of mobile services, that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure . . . ."[5/] Lawmakers recognized that a patchwork

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4/ McCaw Comments at 5-16.

5/ H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

of inconsistent state regulation would undermine the growth and development of mobile services.[6/] The statutory preemption of state rate regulation is broad and unconditional. Indeed, the Commission has recognized, "Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b)" of the Communications Act, which otherwise acts as a bar on federal regulation of intrastate services.[7/]

Consistent with its objectives, Congress envisioned the exercise of state entry and rate regulatory authority only in extreme cases: when significant market failure justified substituting regulation for the operation of market forces.[8/] To ensure the benefits of this uniform federal framework, Congress admonished the Commission against routinely granting state petitions for rate regulatory authority, particularly in the initial period after enactment of Section 332(c).[9/]

[6/] See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) ("Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied); see also id. at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection . . . so that . . . similar services are accorded similar regulatory treatment").

[7/] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1506 (1994) ("Second Report and Order").

[8/] 47 U.S.C. § 332(c)(3). Any broader sanction of state regulatory authority over providers of commercial mobile services would also confer an unfair advantage on "private" carriers that offer functionally equivalent services but that will remain classified as private -- and thus beyond the reach of any state regulation -- until 1996. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(c)(2)(B), 107 Stat. 312, 396 (permitting private carriers to remain classified as private for three years after the date of enactment).

[9/] See House Report at 261 (in reviewing petitions filed by the states, "the Commission also should be mindful of the Committee's desire to give the policies embodies [sic] in the Section

State rate regulation is presumptively incompatible with Congress's express desire for uniform national regulation of commercial mobile services.[10/] It is also inconsistent with the Commission's "principal objective" of ensuring that "unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers . . ."[11/] To further the legislative objectives of uniformity and the growth and development of mobile services, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. Given Congress's deliberate choice "generally to preempt state and local rate and entry regulation of all commercial mobile radio services,"[12/] the Commission "vigorously implemented the preemption provisions of the Budget Act"[13/] by requiring that states "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[14/] The Commission found specifically that preemption "will help promote investment in the wireless infrastructure

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332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee").

10/ See House Report at 260; Conference Report at 490, 494.

11/ Second Report and Order at 1418. See also id. at 1421 (regulation of CMRS must be "perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services -- rather than as a burden standing in the way of entrepreneurial opportunities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning").

12/ Id. at 1504 (emphasis supplied).

13/ Id. at 1419.

14/ Id. at 1421.

by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[15/]

The Commission's preemption decision was also dictated by the fundamental regulatory and policy decisions in the Second Report and Order. The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[16/] By forbearing from regulation, the Commission also assured that like mobile radio services would be subject to consistent regulatory treatment.

Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation,[17/] the "substantial hurdle" to be met by states seeking to regulate cellular services cannot be satisfied merely with evidence, such as that offered by the CPUC, of market imperfections, or less than fully competitive conditions. Rather, the Second Report and Order suggests a three-part test, with the petitioning state required to meet its burden of proof on each part of the test.

15/ Id.

16/ Id. at 1467.

17/ See, e.g., id. at 1472.

First, to support a petition for rate authority, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation.[18/] Second, since the Commission expressly relied upon the continuing applicability of Section 201 and 202's requirements for just, reasonable, and not unreasonably discriminatory rates, and the availability of the complaint procedure under Section 208 to address any residual competitive problems, the CPUC must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these federal remedies.[19/] Finally, in the unlikely event that a state can satisfy the factors described above, it must also show that any residual risks to consumers, i.e., the marginal benefits of the proposed state regulation, outweigh the substantial costs associated with regulation.[20/]

Approval of a state petition that fails to meet this test would contravene the statutory framework, resulting in the imposition of rate regulation under circumstances in which the Commission itself has found such regulation to be unnecessary and counterproductive. Contrary to the suggestion of the CPUC, McCaw has not invented this three-part analysis out of whole cloth.[21/] As McCaw pointed out in its Comments, the statutory standard which bound the

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[18/] McCaw Comments at 12-14.

[19/] Id. at 14.

[20/] Id. at 14-16.

[21/] CPUC Reply Comments at 5.

Commission in deciding whether to forbear from regulation at the federal level is identical to the statutory standard which the Commission must apply in determining whether to grant state petitions to retain regulatory authority.[22/] The Commission considered all three parts of the test set forth by McCaw in deciding to forbear from regulation at the federal level. For the Commission to apply a different analysis to the state petitions, as the CPUC suggests, would be the height of arbitrary action.

As set forth below, the CPUC has not met its burden of proof on any prong of this three-part test, with or without the originally redacted data.

II. THE NEWLY UNREDACTED DATA DOES NOTHING TO STRENGTHEN THE CPUC'S FATALLY DEFECTIVE CASE FOR RETENTION OF STATE REGULATORY AUTHORITY

California has utterly failed to make the substantial showing required to justify the authority it seeks in the above-captioned proceeding. Rate regulation is unnecessary in light of current and reasonably foreseeable market conditions. The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to support broad forbearance from rate regulation. The CPUC has provided no evidence that the level of competition in California departs significantly from the market conditions relied upon by the Commission, nor has it demonstrated that cellular carriers in California have exercised market power.

The economic analysis put forward to support California's claim for regulatory authority is fundamentally flawed. The CPUC ignores the fact that cellular carriers will soon face

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22/ McCaw Comments at 13-14.

competition from so-called enhanced specialized mobile radio systems ("ESMRs") and from licensees using the 120 MHz of spectrum recently made available for personal communications systems ("PCS");[23] it ignores declining prices for cellular service and the substantial recent growth in subscribership and investment by cellular carriers;[24] it attempts to "prove" market concentration by using analytical tools intended to evaluate mergers rather than the appropriateness of regulation;[25] it concludes erroneously that cellular systems have excess capacity;[26] and, in concluding that cellular carriers have enjoyed "excess" earnings, fails to recognize the scarcity value of the electromagnetic spectrum and the substantial start-up losses incurred universally by cellular carriers.[27] At most, California's flawed economic analysis demonstrates only that the CMRS marketplace is not perfectly competitive. But, as the Commission itself has acknowledged, perfect competition is not a necessary prerequisite for forbearance.

Most importantly, the CPUC has failed to demonstrate that consumers would benefit from regulation.[28] Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. Rate regulation also deters new investments, improvements in service quality, and new entrants in the marketplace. By seeking to impose

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[23] Id. 34-35.

[24] Id. 33-34.

[25] Id. 36-37.

[26] Id. 41-43.

[27] Id. 43-46.

[28] Id. 46-49.

rate regulation solely on cellular operators, moreover, the CPUC would reestablish the very regulatory disparities that last year's comprehensive amendment of Section 332(c) of the Communications Act was intended to correct.

The unredacted data does nothing to bolster the CPUC's defective case for retention of regulatory authority. In fact, review of the petition in light of the unredacted data reveals the CPUC has in several instances simply mischaracterized the data. Moreover, even to the extent that the data support the arguments which the CPUC offers, these arguments are economically unsound and analytically flawed, and do not justify grant of its petition.

A. The Unredacted Data on Market Shares Does Not Support the CPUC's Claim of a Lack of Competition in the Provision of Commercial Mobile Radio Services

The CPUC's petition relies upon the newly unredacted data in Appendix E to demonstrate that market shares of facilities-based cellular carriers are "stable." Without any economic analysis authority whatsoever, the CPUC petition posits that this supposed circumstance is evidence "that there is no significant competition at the wholesale level..."[29/] As set forth in the Supplemental Owen Declaration attached hereto, even if market shares were stable, this would not demonstrate a lack of competition.[30/] In any case, the CPUC selected only the data which support its allegation of stable market share, and has ignored conflicting data contained in Appendix E.[31/] As further set forth in the Supplemental Owen Declaration, there were

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29/ CPUC Petition at 29.

30/ Supplemental Owen Declaration at 3-4.

31/ Id. at 4.

considerable changes in the market shares of the facilities-based cellular carriers in four of the six major markets described in Appendix E. In fact, the Supplemental Owen Declaration establishes that these changes were significant even in two of the markets which the CPUC petition characterized as "stable."[32/]

B. The Unredacted Data on the Market Share of Resellers does not Evidence a Lack of Competition in the Provision of Commercial Mobile Radio Services

As set forth in McCaw's Comments, the protection of resellers has been a linchpin of regulatory policy in California throughout its misguided history. As such, it is not surprising that the CPUC should uncritically assume that the allegedly declining fortunes of resellers in California is evidence of anticompetitive behavior by cellular carriers. Since this assumption is economically bankrupt, even conclusive evidence that resellers are in danger of "disappearing" would not establish a lack of competition. Newly unredacted data do not, however, support the CPUC's wrong-headed argument.

Far from showing that resellers will imminently "disappear," the CPUC's focus on market shares obscures the critical fact, revealed by the unredacted data, that the customer base of resellers in California has been relatively stable over the five-year period covered by the data.[33/] Not content with this piece of economic obscurantism, the CPUC has apparently used the newly unredacted data on the relative market shares of resellers and facilities-based carriers to concoct a series of inflated "H Index numbers" purporting to demonstrate the level of

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32/ Id.

33/ Id. at 6.

concentration in commercial mobile radio service markets.[34/] The H Index is designed to measure concentration of market shares of independent firms within a market. Amazingly, and without any support in the economic literature or any established methodology, the CPUC assumes away competition between cellular carriers and combines their market shares as if they were one firm.[35/] Not surprisingly, when one assumes away competition when inputting market shares into the Index, the Index is much higher. The CPUC then uses the resulting concentration levels as evidence of the absence of competition it assumed away in the first place. This kind of circular reasoning is obviously not evidence which meets the burden of proof imposed on the CPUC by Congress and the Commission.

Nor does the CPUC provide any evidence that the declining market shares of independent resellers are the result of actions by facilities-based carriers. It is worth noting that whatever has been happening to the market share of resellers in California has occurred even though cellular carriers have been required to provide services to resellers at a mandatory margin below retail prices. Given this margin, it is difficult to imagine how the CPUC can conclude that the resellers' rates are subject to the "market power" of the facilities-based carriers. A more plausible explanation for declining reseller market share in California is that, as cellular rates decline and subscriber monthly revenues decrease, thinly-capitalized resellers have opted not to incur the substantial up-front costs of acquiring new customers aggressively.[36/]

[34/] CPUC Petition at 32-34.

[35/] Supplemental Owen Declaration at 6-7.

[36/] See McCaw Comments at 37.

In fact, there is no evidence that facilities-based carriers are pricing wholesale service in a discriminatory manner to the detriment of resellers.[37] Whether or not the California petition is granted, wholesale carriers remain subject to the statutory prohibition on unreasonable discrimination. The appropriate remedy for a claim of discrimination is the complaint process rather than the imposition of burdensome and unnecessary rate regulations.

Most importantly, as set forth in full in McCaw's Comments, the market share of resellers has no particular implications for competition or for consumer well-being. Suppliers may be vertically-integrated into retailing or they may sell only through resellers or they may use both of these organizational forms; all of these options are compatible with competition.[38] What matters to the consuming public are the retail price and the quality of the service that is offered, and there is absolutely no evidence that resellers have a uniquely beneficial impact on either of these attributes.[39]

C. The Newly Unredacted Data On Capacity Utilization Do Not Provide Evidence of Lack of Competition

Despite the irrefutable facts that the cellular subscribership growth has been robust -- and is only increasing -- and that infrastructure investment has grown tenfold in the last decade, the

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[37] Id. 22-24.

[38] See id. at 23; 37-38.

[39] Conversely, it is fundamentally incorrect to argue, as the CPUC does, that the level of competition in the CMRS market can be enhanced by increasing or protecting the share of retail sales made through independent resellers. In order to reduce prices, a regulatory policy would need to increase capacity and output in the market. Resellers do not add capacity. See id. at 22, 23-24.

CPUC asserts that cellular carriers have kept prices high, constraining demand.[40/] As evidence for this conclusion, the CPUC referenced data, now unredacted, that purportedly shows that the cellular systems enjoy excess capacity. Essentially, the CPUC argues that the presence of excess capacity proves that the cellular industry in California is not competitive, since a truly competitive market would presumably have set prices at a level where demand always meets available supply. The CPUC is wrong both on its facts and its economics.

The newly unredacted data has for the first time allowed the parties to see the actual basis upon which the CPUC has alleged that cellular systems in California have excess capacity. As set forth in the Supplemental Owen Declaration attached hereto, the CPUC's characterization of the data in the petition significantly understates the actual level of capacity utilization shown by the underlying data.[41/] Moreover, the data at most demonstrate that within typical cellular systems, some of the cells making up the system are operating at less than "full" capacity. The underlying data not referenced by the CPUC also show that many cells in the systems studied are operating in excess of full capacity.[42/] The data thus, at most, support an argument that capacity in cellular systems is not uniformly utilized.

The CPUC's contention that this capacity utilization pattern indicates that carriers are artificially limiting supply fundamentally misconstrues cellular system capacity dynamics.[43/]

40/ Id. at 31-33.

41/ Supplemental Owen Declaration at 8.

42/ Id.

43/ McCaw Comments at 41-42.

Evidently, the CPUC assumes that data indicating unused capacity in certain cells within a system warrants a finding that the system itself has excess capacity and that prices should be cut in order to "clear" the carrier's inventory of available radio channel. This analysis overlooks two critical facts. First, at any given point, cellular systems are designed to accommodate short-term subscriber growth -- which industry statistics show is continuing to accelerate -- and episodes of exceptional traffic demand, such as occur in connection with special events, natural disasters (e.g., earthquakes, fires) or accidents. Second, any cellular system will experience excess capacity in its perimeter cells, which handle less traffic than its core cells. Consequently, even a system that experiences commercially unacceptable call blockings on its core cells during peak hours will appear, by unsophisticated measures at least, to have unused capacity.

The CPUC's accusation is inconsistent with its own analysis of the cellular industry's use of package plans, which it claims were designed to "increase usage of existing spectrum capacity."[44/] The CPUC also argues from increases in the number of subscribers per cell between 1985 and 1992 that capacity was not fully utilized during that period. This inference is unjustified from the evidence. There are any number of other explanations for this increase, including declines in the average number of minutes of air time per subscriber and the

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[44/] California Petition at 54. Presumably, the CPUC believes that the appearance of package plans confirms the conclusion that California systems have excess capacity today and that carriers were not trying to generate sufficient demand previously. Whatever one may think about the validity of this inference, it only undercuts the CPUC's case for future rate regulation: if carriers are now pricing service to stimulate demand, what is the basis for suggesting that CPUC rate-setting authority continues to be necessary?

development of techniques that have increased the capacity per cell (e.g., call sectioning) and new radio technologies.[45/]

Finally, the CPUC's analysis ignores the added short-run marginal costs that would arise if cellular carriers actually could operate all of their cells at capacity; those costs include out-of-pocket costs, marketing costs, and the costs associated with increased blocking and other symptoms of system congestion. Those expenses would put upward pressure on prices as a system approached some arbitrarily defined "full capacity." If the CPUC's goal is to set prices that ensure cellular traffic is always at a system's full capacity, one can question how such a policy would serve the public interest. Customers would not only have to contend regularly with system blockage during peak hours, but in all probability would wind up paying higher prices to boot.[46/]

[45/] McCaw Comments at 42-43.

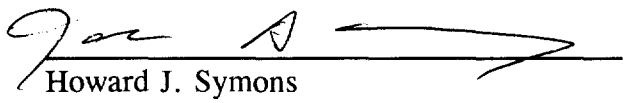
[46/] See id. at 43. While the CPUC defines maximum capacity using a rule of thumb about the probability of blocking that would prevail under competition, the CPUC produces no evidence that the assumed probability of blocking is related to the level that would prevail under competition. In reality, competition would not produce the same probability of peak period blocking everywhere. A cellular provider may seek to distinguish itself in the market by offering a relatively lower probability of blocking than its competitors. That probability may not be close to the levels assumed by the CPUC's definition of maximum capacity. Id. at 43, n.107.

CONCLUSION

Neither the confidential nor the public data relied upon by the CPUC provides sufficient evidence to justify grant of the CPUC's petition. The petition should be expeditiously denied.

Respectfully submitted,

McCAW CELLULAR COMMUNICATIONS, INC.

By: 

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February 24, 1995

36312.1

Redacted Version

Confidential Information Included
Pursuant to Protective Order, PR Docket No. 94-105

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	}	PR Docket No. 94-105

Supplemental Declaration of Bruce M. Owen
on the Unredacted California Petition

I. Introduction

1. On September 19, 1994, I submitted a declaration in this proceeding that discusses my qualifications. At the request of counsel for McCaw Cellular Communications, Inc., my staff and I have reviewed the February 1, 1995, unredacted version of the California petition for authority to regulate rates for commercial mobile radio services (CMRS). The additional data made available in the unredacted petition and appendices do not lead to any change in the analyses or conclusions in my September 19, 1994, and October 19, 1994, declarations. The California Public Utilities Commission (CPUC) has not demonstrated the existence of any problem relating to the competitive performance of CMRS providers, much less any problem that would warrant the high costs of regulating CMRS rates. The Federal

Communications Commission (Commission) recently concluded that relevant markets are sufficiently competitive to justify forbearance from regulation of cellular and other CMRS providers (*CMRS Second Report*, 9 FCC Rcd 1411 (1994) at ¶¶135, 145). Nothing in the CPUC petition undermines this conclusion. Therefore, CPUC regulation of CMRS pricing would be likely to harm consumers. The Commission should not grant the CPUC's petition.

2. The additional data that have now been made available reveal that the CPUC based three of the arguments in its petition on data that are inaccurate and misleading. Readers of the redacted petition had no way of knowing this. This reinforces my previous conclusion that the CPUC's performance in this proceeding casts doubt on the adequacy of its tools for administering a sensible system of CMRS regulation.

3. No one, including the CPUC, has demonstrated that the presence today of only two cellular providers in each area has resulted in anticompetitive behavior, including supra-competitive pricing.[1] Without such a demonstration, no case can be made for regulation of CMRS prices. The CPUC has offered analyses and data that allegedly demonstrate that cellular carriers have been exercising market power. None of this evidence, individually or collectively, demonstrates the exercise of market power. Claims about anticompetitive behavior are based on faulty economic analysis. By contrast, there is evidence of sufficient competitive behavior and benefits to consumers to justify continued forbearance from economic regulation.

4. The key question regarding rate regulation, including interim rate regulation, is whether it is likely to be cost-effective in the future world to which it would be applied. As a result of changes in technology and Commission initiatives, the market for CMRS is already experiencing new entry, and additional CMRS providers will soon offer competitive cellular-like services. Because regulation cannot be justified based on evidence regarding past and present conditions, clearly there is no basis for continuing or future regula-

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1 See my declarations analyzing the petitions of other states in this proceeding, and my declaration submitted in CC Docket 94-54 (*In the Matter of Equal Access and Interconnection Obligations Pertaining to CMRS*, September 12, 1994).

tion. Moreover, cellular carriers can see that the establishment of new CMRS providers eliminates any possibility of acquiring or exercising market power in the future. Because the market will inevitably be competitive, incumbent suppliers are unlikely now to do things that would reduce their ability to compete and their market shares in the future. Rather, it is likely that expectations regarding entry are already spurring them on to reduce costs, improve services, and win new subscribers.

5. If state regulation of prices of cellular services were in the public interest, the CPUC should be able to demonstrate benefits from past state regulation. This could be done by comparing states that regulated with states that did not. However, there is no evidence in the CPUC petition or elsewhere that regulation of cellular service prices in California or other states has had any beneficial effect in the past.

6. Regulation of CMRS prices imposes substantial costs on consumers. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. They deter new investments, quality improvements, introduction of new services, and entry by reducing returns on pro-competitive activities. The distorting effects of price regulations that limit returns on investments are likely to be greatest in industries such as CMRS that are characterized by rapid growth, technological change, and relatively high risk.

7. While my analyses and conclusions are unchanged by the additional data that have now been made available by the CPUC, those data reveal that three of the arguments in the CPUC petition use inaccurate and misleading data. These inaccuracies are addressed in Sections II through IV below.

II. Alleged Stability of Wholesale Shares

8. The CPUC argues that allegedly stable wholesale market shares for cellular services imply that there is no significant competition between facilities-based cellular carriers (CPUC Petition at 29). However, even if one assumed that shares in an appropriately defined relevant market did not change sub-